

1 THE HONORABLE JOHN C. COUGHENOUR  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 BAREND VAN ZANTEN and  
11 CANDACE VAN ZANTEN,

Plaintiffs,

v.

CITY OF OLYMPIA,

Defendant.

CASE NO. C10-5216-JCC

ORDER

This matter comes before the Court on the parties' cross-motions for summary judgment.  
(Dkt. Nos. 17, 22.) Having considered the parties' briefing and the relevant record, the Court grants Defendant's motion and denies Plaintiffs' motion for the reasons explained herein.

**I. BACKGROUND**

This matter involves a dispute over the drainage of water across Plaintiffs' property in Olympia, Washington. The property, although undeveloped itself, is located within the city limits in a neighborhood that was developed decades ago. The property borders approximately 50 feet of Berry Street to the east, two developed parcels to the north and south, and city property to the west. Plaintiffs' property slopes downward from east to west, and the parties agree that the property serves as a natural drainage area for at least some of the surrounding land. (Dkt. No. 17 at 1; Dkt. No. 22 at 2.) Beyond the city property to the west is East Bay Drive, and beyond that Budd Inlet, part of Puget Sound.

1 Plaintiffs became interested in the property in 2003 and contacted its owner at the time  
2 about purchasing it. Plaintiffs also personally inspected the property at that time. (Dkt. No. 28 at  
3 4.) They executed a purchase and sale agreement in April 2003, agreeing to pay \$62,500 for the  
4 property. (Dkt. No. 21 at 14.) The agreement included three contingencies, one of which was the  
5 “issuance of a building permit to Purchaser’s specifications.” (*Id.* at 15.) At the time Plaintiffs  
6 executed the purchase and sale agreement, they were aware that two culverts direct stormwater  
7 under Berry Street from the properties on the eastern side of the street. (Dkt. No. 28 at 4.) The  
8 water from the culverts flows westerly across Plaintiffs’ property and empties into a catch basin  
9 located on the city lot to the west, and from there it is directed under East Bay Drive and  
10 discharged into Budd Inlet. The parties do not know whether the culverts were installed by the  
11 city or by a private developer, but there is no dispute that they were in place as of 1983. (Dkt.  
12 No. 35 at 2, 11.)

13 After executing the purchase and sale agreement, but before they had closed the sale of  
14 the property, Plaintiffs began the process of obtaining a building permit. On April 23, 2003, they  
15 met with city officials in a pre-submission conference, which does not “definitively establish the  
16 conditions of development,” but rather is intended to identify likely requirements for building on  
17 a property. (Dkt. No. 18 at 3.) Plaintiffs were told at the conference that the lot was “wet and  
18 potentially unstable to build on” given the historical drainage on the property and its position as  
19 the low point on the Berry Street grade. (Dkt. No. 18, Ex. 2.) City officials told Plaintiffs that  
20 drainage pipes would have to be built to handle the water from the culverts, and that the city  
21 would need a 20-foot-wide easement to maintain the pipes. (Dkt. No. 18 at 4; Dkt. No. 28 at 4.)  
22 As the property is only 50 feet wide, Plaintiffs determined that they would not be able to develop  
23 the property after granting the city a 20-foot easement. They therefore proposed in a letter to city  
24 officials that they be allowed to “engineer, install and maintain the proposed storm drain lines” at  
25 their own expense and that the city’s involvement be limited to reviewing the engineering plans  
26 and inspecting the installation. (Dkt. No. 35 at 15.) The city agreed to this request, with the

1 understanding that Plaintiffs would assume responsibility for maintenance of the drain lines once  
2 installed.

3 Plaintiffs hired an engineer in December 2003 to assist in devising a plan for designing  
4 the drain lines. (Dkt. No. 28 at 5.) In September 2005, they submitted the plan to the city  
5 Engineering Plans Examiner for approval. (Dkt. No. 18 at 5.) The plan called for routing storm  
6 drainage to the north and south boundaries of the property, where it would be collected in  
7 “tightline” pipes and directed to the western edge of the property. (Dkt. No. 28 at 5.) From there  
8 it would flow in “riprap” rock channels to the catch basin on city property. (*Id.*) The Engineering  
9 Plans Examiner requested additional geotechnical reports and proposed several modifications to  
10 the plan, including that the water be conveyed to the city catch basin in tightline pipe rather than  
11 via riprap channel. (Dkt. No. 18 at 6, Ex. 6; Dkt. No. 28 at 6.) Plaintiffs agreed to those changes  
12 and submitted a revised plan on July 3, 2006. The city approved the plan on July 12, 2006. (Dkt.  
13 No. 18 at 7.) Plaintiffs began construction of the drainage lines over a year later, in August 2007,  
14 and the city approved the construction as complete in September 2007. (*Id.* at 8.) Plaintiffs also  
15 closed the sale of the property around this time, over four years after executing the purchase and  
16 sale agreement.

17 In December 2007, during an unusually strong storm, the water flowing through the  
18 tightline pipe overflowed the catch basin on city property, caused some erosion of the  
19 surrounding soil, and washed down the slope to East Bay Drive. (Dkt. No. 22 at 5.) The  
20 Engineering Plans Examiner was notified of the event by an area resident and became concerned  
21 that the installed drainage system was inadequate. (Dkt. No. 18 at 9.) He requested that the  
22 tightline pipe be replaced with a riprap channel—the initial design proposed by Plaintiffs’  
23 engineer. (*Id.*; Dkt. No. 28 at 6.) Plaintiffs agreed to have their engineer develop a plan for the  
24 removal of the tightline and installation of a riprap channel. They submitted that plan to the city  
25 for review in August 2008, and the city’s Stormwater Engineer provided comments on the plan  
26 to Plaintiffs on September 3, 2008. (Dkt. No. 18 at 9.) Plaintiffs have decided not to proceed with

1 implementing the plan unless the city pays for the changes, and the tightline remains in place.  
2 After the December 2007 storm, the city replaced the grate covering the catch basin that had  
3 overflowed with one designed to permit water to flow through more easily. (*Id.*) No further  
4 incidents of overflow have been reported since the grate was replaced.

5       The parties continued to discuss permitting issues related to the property, and in February  
6 2009, the city official who oversees building projects told Plaintiffs that they could proceed with  
7 filing a building permit application regardless of the water drainage issue. (Dkt. No. 35 at 7.) A  
8 month later, the same city official informed Plaintiffs that a conventional retaining wall and  
9 foundation would be acceptable for the property. (*Id.* at 6.) Plaintiffs were also given permits to  
10 proceed with tree removal on the property. (*Id.*)

11       In December 2009, Plaintiffs sent the city a notice of intent to file suit under the Clean  
12 Water Act. (Dkt. No. 32.) Three months later, Plaintiffs filed their Complaint, alleging violations  
13 of the Clean Water Act, trespass, nuisance, and arbitrary and capricious conduct. (Dkt. No. 1.)  
14 Both parties move for summary judgment on all claims.

15 **II. DISCUSSION**

16       Summary judgment is proper “if the movant shows that there is no genuine issue as to  
17 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
18 56(a). The Court must view all evidence in the light most favorable to the nonmoving party and  
19 draw all reasonable inferences in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
20 242, 248–50 (1986). A genuine issue of material fact exists where there is sufficient evidence for  
21 a reasonable fact finder to find for the nonmoving party. *Id.* at 248. The inquiry is “whether the  
22 evidence presents a sufficient disagreement to require submission to a jury or whether it is so  
23 one-sided that one party must prevail as a matter of law.” *Id.* at 251–52.

24       **A. Clean Water Act**

25       The Clean Water Act (CWA) prohibits the discharge of pollutants into the navigable  
26 waters of the United States, with certain statutory exceptions. *See* 33 U.S.C. § 1311(a). One such

1 exception is for holders of permits issued under the National Pollutant Discharge Elimination  
2 System (NPDES). 33 U.S.C. § 1342. The NPDES program is the “centerpiece” of the CWA, and  
3 permits issued under the program contain specifically delineated discharge limitations. *Am. Iron*  
4 & Steel Inst. v. Envtl. Prot. Agency, 115 F.3d 979, 995 (D.C. Cir. 1997). Essentially, the  
5 discharge of any pollutant from a “point source” into navigable waters without an NPDES permit  
6 is prohibited. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011). Regulations  
7 promulgated under “Phase II” of the NPDES program require permits for discharges from  
8 municipal separate storm sewer systems (MS4s) in small cities. *Id.* at 1082.

9       The CWA authorizes citizen suits under 33 U.S.C. § 1365 “to enforce water quality  
10 standards [and] effectuate complementary provisions of the CWA and the underlying purpose of  
11 the statute as a whole.” *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 989 (9th Cir.  
12 1995). The statute defines “citizen” as “a person or persons having an interest which is or may be  
13 adversely affected.” 33 U.S.C. 1365(g). The Act does not permit citizen suits for wholly past  
14 violations; citizen-plaintiffs must make good faith allegations of continuous or intermittent  
15 violations. *Natural Res. Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 998 (9th Cir.  
16 2000).

17       Plaintiffs argue that the discharge of stormwater onto their property violates various  
18 provisions of the NPDES permit issued to the City of Olympia in 2007. Defendant counters that  
19 Plaintiffs lack standing to bring a citizen suit under the CWA and that, regardless of their lack of  
20 standing, Plaintiffs have failed to show any violation of the Act.

21       **1. Standing**

22       Article III of the Constitution establishes the requirements for standing to sue under the  
23 CWA. A plaintiff must show (1) an “injury in fact” that is (a) concrete and particularized and (b)  
24 actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the  
25 action of the defendant; and (3) that it is likely that the injury will be redressed by a favorable  
26 decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 180-181

1 (2000). Defendant argues that Plaintiffs show no ongoing injury and that their alleged harm  
2 would not be redressed if this suit were successful. (Dkt. No. 17 at 8.) Plaintiffs respond that  
3 their inability to use their property for a single-family residence constitutes injury sufficient to  
4 confer standing under the statute. (Dkt. No. 22 at 12.)

5       The Court agrees with Defendant that Plaintiffs have offered no evidence of an “injury in  
6 fact” that is “not conjectural or hypothetical” as required under *Laidlaw*. 528 U.S. at 180. First,  
7 Plaintiffs concede that they knew when they agreed to purchase the subject property in April  
8 2003 that water from surrounding area drained across the property. Owners of a neighboring  
9 parcel spoke of a “stream” running through the property, and the former owner of the subject  
10 property informed Plaintiffs about the drainage culverts. (Dkt. No. 21 at 8, 11.) Indeed, the price  
11 that Plaintiffs agreed to pay for the property reflected the preexisting drainage issue, and  
12 Plaintiffs made the purchase contingent on their ability to obtain a building permit. Plaintiffs  
13 proceeded to close on the property in 2007, long after the purchase and sale agreement, and well  
14 into their negotiations with the city about how the drainage issue would be addressed. Thus,  
15 Plaintiffs have not shown that their interest in the property has been adversely affected by the  
16 water draining through the culverts.

17       Second, the record flatly contradicts Plaintiffs’ assertion that they are unable to use the  
18 property for a single-family residence. Plaintiffs have not applied for, let alone been denied, a  
19 building permit for a residence on the property. In fact, they have been informed by city officials  
20 that they may proceed with filing a building permit notwithstanding the water drainage issue, and  
21 the city has approved Plaintiffs’ applications for permits related to building a home, including  
22 the use of a conventional foundation and the removal of trees. Given these undisputed facts,  
23 Plaintiffs’ alleged injury is at best the kind of conjectural or hypothetical injury that does not  
24 meet the requirements of Article III.

25       Third, Plaintiffs do not allege any interest in the environment or clean water sufficient to  
26 establish standing here. The Ninth Circuit has held that a claim under the citizen-suit provision

1 should “arise from an interest in the environment” and seek to vindicate at least some  
2 environmental concerns. *Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d  
3 571, 575 (9th Cir. 1984). Here, the allegation that Defendant is discharging pollutants into Budd  
4 Inlet is wholly unrelated to Plaintiffs’ alleged injury—their inability to develop their property.  
5 And Plaintiffs do not argue that their use or enjoyment of Budd Inlet has been impaired by  
6 Defendant’s actions. Like the plaintiff in *Dan Caputo*, whose alleged injury arose from the  
7 reallocation of grant funds, Plaintiffs here do not seek to vindicate environmental concerns. See  
8 *id.*; *Gonzales v. Gorsuch*, 688 F.2d 1263, 1268 (9th Cir. 1982) (purpose of citizen-suit provision  
9 is “to insure that an interest in the environment and clean water, whether or not economically  
10 based, is a sufficient basis for a citizen suit”).

11 In light of these defects, the Court concludes that Plaintiffs have not established standing  
12 to sue Defendant for alleged violations of the CWA.

13 **2. Violation**

14 Even if Plaintiffs were able to satisfy the standing requirements above, their CWA claim  
15 fails on the merits. Interpreting the evidence in the light most favorable to Plaintiffs, there is no  
16 genuine issue as to whether Defendant has violated the CWA or the terms of Defendant’s  
17 NPDES permit.

18 Plaintiffs allege five violations of Defendant’s NPDES permit. First, they claim that  
19 Defendant is “collecting, diverting and discharging storm water onto Plaintiffs’ property without  
20 an agreement from Plaintiffs in violation of Section S3 of the Phase II Permit.” (Dkt. No. 22 at  
21 13.) According to Plaintiffs, Defendant has attempted to transfer its own responsibilities under  
22 the NPDES permit to Plaintiffs by requiring that they construct a conveyance for the stormwater  
23 flowing through the culverts under Berry Street. (Dkt. No. 41 at 19.) Plaintiffs note that the  
24 permit does not allow a municipality to require private citizens to fulfill the permit’s  
25 requirements.

26 This claim fails for two reasons. The first is that Defendant has not “required” Plaintiffs

1 to assume its responsibilities under the permit. There is no dispute that Defendant originally  
2 offered to build drainage pipes to handle the water from the culverts, but when Plaintiffs  
3 determined that the easement necessary to maintain such pipes would likely interfere with their  
4 ability to build a home on the property, they requested that they be allowed to construct a  
5 drainage system on the property at their own expense. The city granted that request, all of which  
6 occurred prior to the issuance of the NPDES permit.

7       The second reason this claim fails is that Section S3 of the NPDES permit does not  
8 address the handling or redirection of stormwater by private citizens. Section S3 merely states  
9 that the city is responsible for the MS4 that it owns and operates. (Dkt. No. 20 at 21.) Contrary to  
10 Plaintiffs' repeated contentions, the drainage system on their property is not part of the city's  
11 permitted MS4. *See* 40 C.F.R. § 122.26(b)(8) (defining MS4 as "a conveyance or system of  
12 conveyances . . . owned or operated by a State, city, town . . . or other public body . . . [d]esigned  
13 or used for collecting or conveying stormwater"). Nothing in the permit—let alone Section S3—  
14 forecloses the construction or maintenance of private stormwater conveyance systems, nor does  
15 the permit require the city to ensure that all stormwater remains exclusively in its MS4 prior to  
16 discharge. Plaintiffs therefore have not raised a genuine issue of fact as to any violation of  
17 Section S3 of the permit.

18       Plaintiffs' second CWA claim is that Defendant violated Section S4 of the NPDES  
19 permit by conveying stormwater onto their property without using best management practices or  
20 "all known available and reasonable treatment" (AKART) to reduce the discharge of pollutants  
21 to the maximum extent practicable. (Dkt. No. 22 at 13, 15.) But the Washington State  
22 Department of Ecology—the administering authority for Defendant's NPDES permit—has  
23 determined that for Phase II permittees, "the development, implementation and enforcement of  
24 stormwater management programs required under [the] permit" meets the AKART standard and  
25 "constitutes the controls necessary to reduce the discharge of pollutants to the maximum extent  
26 practicable." (Dkt. No. 20, Ex. 7 at 31-32.) Defendant has submitted unrefuted evidence that it

1 has adopted a stormwater management plan and that it has complied with the terms of its NPDES  
2 permit for implementing that plan. (Dkt. No. 20, Ex. 2.) This is fatal to Plaintiffs' second claimed  
3 violation of the CWA.

4 Plaintiffs' third claim is that Defendant has violated Section S4 of the NPDES permit by  
5 "collecting, diverting and discharging storm water to flow from Berry Street and the surrounding  
6 areas to Budd Inlet through nonexistent or defective/improperly maintained erosion and sediment  
7 controls." (Dkt. No. 1 at 6.) Plaintiffs offer little detail on this claim, other than to state without  
8 support that the catch basin located on city property to the west of Plaintiffs' property "is  
9 obviously undersized and cannot handle" the amount of stormwater that flows into it. (Dkt. No.  
10 22 at 17.) It is not clear how this allegation, if true, would show a violation of Section S4, which  
11 does not address erosion or sediment controls. To the extent that Plaintiffs are arguing that the  
12 catch basin contravenes best management practices or AKART, this claim fails for the same  
13 reason Plaintiffs' second claim fails: Defendant has adopted and implemented a stormwater  
14 management plan that meets the requirements of the NPDES permit. On the other hand, if  
15 Plaintiffs are alleging that the overflowing of the catch basin in December 2007 somehow  
16 entailed a violation of the terms of the permit, the claim fails for failure to show a continuous or  
17 intermittent violation of the CWA. *See Southwest Marine*, 236 F.3d at 998. Either way, this  
18 claim cannot survive.

19 Plaintiffs' fourth claim is that Defendant has discharged water "to Budd Inlet of the Puget  
20 Sound with sediment levels in excess of permissible standards in violation of Section S4 of the  
21 Phase II Permit." (Dkt. No. 1 at 6.) A plaintiff alleging a violation of water quality standards,  
22 however, must proffer at least some data or sampling suggesting excessive effluent levels.

23 *Natural Res. Def. Council v. County of Los Angeles*, --- F.3d ---, 2011 WL 2712963 at \*18 (9th  
24 Cir. 2011) (affirming summary judgment on claims that city violated NPDES permit by  
25 discharging pollutants through its MS4 because plaintiffs failed to "sample from *at least one*  
26 outflow that included a standards-exceeding pollutant") (emphasis in original). Here, Plaintiffs

1 have offered no water quality data whatsoever, much less water quality data showing effluent  
2 levels in Budd Inlet in excess of the limitations in the permit. Plaintiffs' therefore have not met  
3 their evidentiary burden as to the fourth claim.

4 Plaintiffs' fifth claim is that Defendant has violated planning, monitoring, and reporting  
5 requirements of the NPDES permit. (Dkt. No. 1 at 6.) Plaintiffs have offered no further evidence  
6 or argument in support of this claim, which necessarily fails.

7 In their summary judgment motion, Plaintiffs additionally allege that Defendant has  
8 failed to maintain storm water structures or mitigate erosion in violation of General Condition  
9 G2 of the NPDES permit. (Dkt. No. 22 at 18.) This allegation was not included in either the  
10 Complaint or the Notice of Intent to Sue and is therefore barred. *See* 33 U.S.C. § 1365(b) (no  
11 action under citizen-suit provision may be commenced prior to 60 days after notice of the  
12 violation has been given). Moreover, this claim is subject to the same defects as Plaintiffs' third  
13 claim: the adequacy of Defendant's stormwater management program and Plaintiffs' failure to  
14 show an ongoing violation.

15 For the foregoing reasons, Plaintiffs have not raised a genuine issue as to any of the  
16 alleged violations of the Clean Water Act, and summary judgment on the Clean Water Act claim  
17 is therefore warranted.

18       **B. Trespass**

19 Plaintiffs allege that Defendant is also liable for trespass because the discharge of  
20 stormwater through the culverts "is a physical invasion of the property." (Dkt. No. 1 at 7.)  
21 Trespass is (1) an invasion of a plaintiff's interest in the exclusive possession of property, (2)  
22 committed intentionally, (3) with the knowledge and reasonable foreseeability that the act would  
23 disturb the plaintiff's possessory interest, which (4) causes actual and substantial damages.  
24 *Bradley v. Am. Smelting & Ref. Co.*, 104 Wash.2d 677, 692-693 (1985). The statute of  
25 limitations for a trespass action is three years from the date of the invasion. *Id.* at 693. Defendant  
26 argues that Plaintiffs' claim for trespass is barred by the statute of limitations, that Plaintiffs lack

1 authority to bring an action for trespass because they purchased the property with knowledge of  
2 the drainage issue, and that Plaintiffs have not suffered any damages from the discharge of  
3 stormwater on their property. (Dkt. No. 17 at 16-19.)

4       The Court agrees that Plaintiffs' trespass claim is time-barred. The three-year statute of  
5 limitations began to run at the time of the installation of the culverts beneath Berry Street.  
6 Setting aside the fact that Plaintiffs have proffered no evidence that the City of Olympia actually  
7 installed the culverts, there is no dispute that the culverts were in place as of 1983—  
8 approximately 27 years before this action was initiated. Plaintiffs argue that the discovery rule  
9 applies in this instance, citing *Mayer v. City of Seattle*, 102 Wash. App. 66 (2000). In *Mayer*, the  
10 Washington Court of Appeals held that the statute of limitations for the plaintiff's property-  
11 related tort claims began to run when the plaintiff became aware that his property was  
12 contaminated by dust from a nearby cement plant. *Id.* at 76. At that point, the plaintiff had reason  
13 to know that "the value of the property is likely diminished" and that the presence of the dust  
14 "would impede his attempts to develop his property." *Id.* Plaintiffs here suggest that their cause  
15 of action did not accrue until they were told by their retained hydrogeologist in January 2009 that  
16 "water from the entire neighborhood," and not just the immediately surrounding properties,  
17 drained through the culverts. (Dkt. No. 41 at 8.) But it is undisputed that Plaintiffs not only knew  
18 of the culverts when they agreed to purchase the property but also negotiated a contingency with  
19 the seller acknowledging that the water drainage issue could impede their efforts to develop the  
20 property. Thus, under the authority Plaintiffs cite, the discovery rule is inapposite here.  
21 Moreover, regardless of Plaintiffs' impression of the drainage area associated with the culverts,  
22 there is no allegation of any appreciable change in that area since Plaintiffs agreed to purchase  
23 the property in 2003. In other words, Plaintiffs have identified no intentional act by Defendant  
24 within the limitations period which would raise a genuine issue as to whether the statute of  
25 limitations has run.

26       Even if the trespass claim were not time-barred, Plaintiffs cannot prevail on the claim

1 because they can establish neither standing nor the requisite damages from the alleged trespass.  
2 “Ordinarily, a grantee or purchaser cannot sue for a taking or injury occurring prior to his  
3 acquisition of title, but he may sue for any new taking or injury.” *Hoover v. Pierce County*, 79  
4 Wash. App. 427, 433 (1995) (citing *State v. Sherrill*, 13 Wash. App. 250, 257 n. 1 (1975). Here,  
5 any injury from the drainage of stormwater—including any diminution in the value of the  
6 property—occurred well prior to Plaintiffs’ acquisition of title. As explained above, Plaintiffs  
7 have demonstrated no damages from the discharge of the stormwater, given that they negotiated  
8 a purchase price that reflected the drainage issue and that all permit applications associated with  
9 their attempts to develop the property to date have been granted. Plaintiffs’ trespass claim  
10 therefore fails as a matter of law.

11 Plaintiffs also assert that they are entitled to treble damages under RCW 4.24.630, which  
12 applies to liability for intentional trespass. It is not clear from Plaintiffs’ submissions whether  
13 they intended this as a separate claim. Regardless, claims under the statute are subject to a three-  
14 year statute of limitations. *See* RCW 4.16.080(1). Any separate claim by Plaintiffs here is  
15 therefore barred as well.

16 **C. Nuisance Per Se**

17 Plaintiffs further allege that the discharge of stormwater onto their property constitutes  
18 nuisance per se. (Dkt. No. 1 at 7; Dkt. No. 22 at 19.) Under Washington law, interference with  
19 the use and enjoyment of a person’s property, if conducted in violation of statutes, regulations, or  
20 permits, is nuisance per se. *See Tiegs v. Watts*, 135 Wash. 2d 1, 13 (1998). Plaintiffs’ nuisance  
21 per se claim is based entirely on Defendant’s alleged violation of the Clean Water Act. (*See* Dkt.  
22 No. 1 at 7; Dkt. No. 22 at 19-20.) Because Plaintiffs have not raised a genuine issue of fact as to  
23 any violation of the Clean Water Act, their nuisance per se claim fails. In any event, the claim is  
24 time-barred for the reasons stated above.<sup>1</sup> *See* RCW 4.16.130; *Bradley*, 104 Wash.2d at 684

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25  
26 <sup>1</sup> Defendant argues that Plaintiffs’ trespass and nuisance claims fail as a matter of law  
because the city had acquired a prescriptive easement to discharge stormwater onto the subject

<sup>1</sup> (two-year statute of limitations for nuisance actions).

#### **D. Arbitrary and Capricious Conduct**

3 Plaintiffs' final claim is that Defendant's "cavalier actions" in requiring Plaintiffs to  
4 "construct a storm water conveyance system to handle Defendant's MS4 storm water"  
5 constituted arbitrary and capricious conduct under RCW 64.40.020. (Dkt. No. 22 at 23-24.) That  
6 statute, however, requires that a plaintiff exhaust all administrative remedies before commencing  
7 an action. RCW 64.40.030. Plaintiffs have not appealed any decision by the city with regard to  
8 their permit applications, and indeed all applications to date have been approved. Because  
9 Plaintiffs have neither initiated nor exhausted their administrative remedies, summary judgment  
10 must be granted on this claim.

### 11 | III. CONCLUSION

12 For the foregoing reasons, Defendant's motion for summary judgment (Dkt. No. 17) is  
13 GRANTED. Plaintiffs' motion for summary judgment (Dkt No. 22) is DENIED.

14 DATED this 2nd day of November 2011.



John C. Coyner, Jr.

John C. Coughenour  
UNITED STATES DISTRICT JUDGE

26 property. As the Court concludes that summary judgment is appropriate on both claims for other reasons, it does not reach Defendant's argument for a prescriptive easement.